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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1999

PAUL CHRISTOPHER PENLEY,
Petitioner,

vs.

THE STATE OF TEXAS,
Respondent.

PETITION FOR A WRIT OF *CERTIORARI* TO THE COURT OF APPEALS OF TEXAS, SIXTH SUPREME JUDICIAL DISTRICT

JAMES M. MURPHY
Texas State Bar # 14700800
P.O. Box 140809
Dallas, Texas 75214
214-745-1532 (Telephone)
214-823-1816 (Facsimile)

Counsel for Petitioner

April 10, 2000

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QUESTIONS PRESENTED

1. Whether the Texas Court of Appeals erred in holding that application of Rule 407, Texas Rules of Evidence, which prohibits the admission of subsequent remedial measures in certain circumstances, applies in a criminal case where no issue of liability for negligence on the part of the party remedying the defect is to be determined by the trier of fact and the evidence excluded is vital to the defense of the charges against the accused. (III R.R. 197)

2. Whether the trial court's exclusion of evidence about the changes in policies and procedures of the Plano Police Department relating to blood evidence, by applying Rule 407, Texas Rules of Evidence, to criminal cases, deprived Appellant of his rights to Confrontation and cross-examination under the Federal Constitution. (III R.R. 197).

3. Whether the Court of Appeals erred in holding that the trial court was correct in denying the Appellant's motion in limine as it applied to past instances of drinking and driving which effectively deprived Appellant of his right to testify in his own defense and to present a defense to the State's charges by the chilling effect of the allowable scope of cross-examination by the State. (IV R.R. 162).

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In The
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PAUL CHRISTOPHER PENLEY
Petitioner,

vs.

THE STATE OF TEXAS,
Respondent.

ON PETITION FOR A WRIT OF *CERTIORARI*
TO THE COURT OF APPEALS OF TEXAS
SIXTH SUPREME JUDICIAL DISTRICT
AT TEXARKANA, TEXAS

Petitioner, PAUL CHRISTOPHER PENLEY respectfully requests that a writ of *certiorari* be issued to review the Judgment of the Court of Appeals for the Sixth Supreme Judicial District at Texarkana, Texas, which affirmed the judgment of conviction of the Petitioner in the 380th Judicial District Court of Collin County, Texas.

OPINIONS BELOW

The Court of Appeals affirmed Petitioner's conviction and sentence on August 23, 1999 (Appendix A). Petitioner did not file a motion for rehearing. Petitioner timely filed a Petition for Discretionary Review to the Court of Criminal Appeals of Texas. The petition was refused without comment by the Court of Criminal Appeals on January 12, 2000 (Appendix B).

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. Sec.tion 1254.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

U.S. CONST., AMENDMENT V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

U.S. CONST., AMENDMENT VI:

> In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him; ... and to have the Assistance of Counsel for his defence.

U.S. CONST., AMENDMENT XIV:

> . . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of

the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 404, Texas Rules of Evidence: Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes.

(a) Character Evidence Generally. Evidence of a person's character or character trait is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) ***Character of Accused.*** Evidence of a pertinent character trait offered:

(A) by an accused in a criminal case, or by the prosecution to rebut the same, or

(B) by a party accused in a civil case of conduct involving moral turpitude, or by the accusing party to rebut the same;

(2) ***Character of Victim.*** In a criminal case and subject to Rule 412, evidence of a pertinent character trait of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of peaceable character of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor; or in a civil case, evidence of character for violence of the alleged victim of assaultive conduct offered on the issue of self-defense by a party accused of the assaultive conduct, or evidence of peaceable character to rebut the same;

(3) ***Character of Witness.*** Evidence of the character of a witness, as provided in rules 607, 608 and 609.

(b) Other Crimes, Wrongs or Acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon timely request by the accused in a criminal case, reasonable notice is given in advance of trial of intent to introduce in the State's case-in-chief such evidence other than that arising in the same transaction.

Rule 407, Texas Rules of Evidence: Subsequent Remedial Measures; Notification Of Defect.

(a) Subsequent Remedial Measures. When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent remedial measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent remedial measures when offered for another purpose, such as proving ownership, control or feasibility of precautionary measures, if controverted, or impeachment. Nothing in this rule shall preclude admissibility in products liability cases based on strict liability.

(b) Notification of Defect. A written notification by a manufacturer of any defect in a product produced by such manufacturer to purchasers thereof is admissible against the manufacturer on the issue of

existence of the defect to the extent that it is relevant.

STATEMENT OF THE CASE

Petitioner was charged by indictment with the offense of intoxication manslaughter alleged to have occurred in Collin County, Texas, on October 2, 1995 (II C.R. 278-279). A first trial before a jury ended in a hung jury (I C.R. 1). A second trial before another jury resulted in a conviction (II C.R. 374-376) and the punishment was assessed by the same jury at 14 years' confinement in the Texas Department of Criminal Justice, Institutional Division, and a $10,000 fine. Petitioner timely filed a motion for new trial (II C.R. 381-401), which was overruled after hearing (III C.R. 476). Petitioner gave timely notice of appeal on May 1, 1998 (III C.R. 472-473).

Germane to this Petitioner, on direct appeal to the Sixth Court of Appeals of Texas, Petitioner raised the following questions for review:

- Whether the trial court committed material error likely to injure the Appellant's rights when it deprived Appellant of his federal and Texas rights of Confrontation and cross-examination of State's witnesses Christi Wilson and Sandy Collins, Plano Police Department property custodians, regarding changes in the policy of handling blood evidence at

the Plano Police Department since the first trial of this case in August-September, 1996 (III R.R. 197).

- Whether the trial court committed material error likely to injure the Appellant's rights when it excluded evidence offered by Appellant on cross-examination of State's witness Christi Wilson of changes in the policy of handling blood evidence at the Plano Police Department since the first trial of this case in August-September, 1996 (III R.R. 197).

- Whether the trial court committed material error likely to injure the Appellant's rights when it denied Appellant's Motion in Limine with respect to matters pertinent to areas of permissible cross examination of the Appellant if he chose to take the witness stand in his own defense at the guilt/innocence phase of the trial. (III C.R. 347-349) (IV R.R. 162).

The Court of Appeals affirmed the conviction and sentence. Petitioner requested the Court of Criminal Appeals of Texas to review the following issues on discretionary review:

- Whether the Court of Appeals erred in holding that Rule 407, Texas Rules of Evidence, prohibiting the admission of subsequent remedial measures, applies in a criminal case where no issue of liability for negligence on the part of the party remedying the defect is to be determined by the trier of fact. (III R.R. 197).

- Whether the Court of Appeals erred in not considering Petitioner's claims that prohibiting Petitioner from confronting and cross examining Ms. Wilson about the changes in policies and procedures

of the Plano Police Department deprived Petitioner of his rights to the Effective Assistance of Counsel, Confrontation and cross-examination under the Federal and Texas state Constitutions. (III R.R. 197).

- Whether the Court of Appeals erred in holding that the trial court was correct in denying the Petitioner's motion in limine as it applied to past instances of drinking and driving. (IV R.R. 162).

The petition for discretionary review was denied by the Texas Court of Criminal Appeals on January 12, 2000.

ARGUMENT AND REASONS FOR ALLOWANCE OF THE WRIT

There are special and important reasons for granting the writ of certiorari in this case. The Court of Appeals of Texas has decided important questions of federal constitutional law involving the right of Confrontation and the right of a defendant to present a defense that have not been but should be, addressed and settled by this Court. Rule 10(1)(c), Supreme Court Rules.

ARGUMENT UNDER QUESTIONS 1 & 2

Denial of Petitioner's Right of Confrontation and Cross-Examination.

The Texas Court of Appeals decided that Rule 407, TEX.R.EVID.[1] precludes confrontation and cross examination of a state's witness on "subsequent remedial measures" taken by the Plano police department regarding the handling of blood-alcohol evidence that goes to the very heart of the reliability of scientific evidence used against the Petitioner to convict him at his trial. The Texas appellate Court, however, declined to decide the federal constitutional impact of its decision. Petitioner's contention is that application of this rule of evidence in this context conflicts with the fundamental Constitutional right of a citizen accused to confront and cross-exam witnesses and evidence presented against him and that he should be granted a new trial to present such evidence to the trier of fact.

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[1] Tex.R.Evid. 407, is virtually identical to Fed.R.Evid. 407, except that the last sentence in the Texas Rule does not appear in the Federal Rule. As in this case, the issue presented may very well arise in the context of federal criminal trials

(i) Factual Background.

As has been noted, the case before this Court was a re-trial of a first trial of the case that ended in a hung jury at the guilt/innocence phase of the trial in August & September, 1996. During the first trial, Petitioner presented the testimony of an expert, Dr. William T. Lowry, that the handling of the blood evidence in the case made any testing of the sample unreliable, particularly because of the way the blood was drawn with a syringe and stored at room temperature for 18 days. Significantly, in the first trial the State did not call the evidence custodians of the Plano Police Department who had custody of a vial of blood from the date of the accident, October 2, 1995, until it was taken to the Department of Public Safety laboratory on October 20, 1995. Nor did the State call Nurse Molly Golson.

On retrial, the State called Christi Wilson to testify as to the chain of custody of the blood vial alleged to contain Mr. Penley's blood (III R.R. 200). Before putting Ms. Wilson on the stand, the State made an oral motion in limine under Rule 407, Texas Rules of Criminal Evidence, requesting the Court to exclude from evidence any mention of and to prevent the defense by cross-examination of the

Plano property clerks the policies, practices and procedures of the Plano Police Department and their evidence custodians for handling blood evidence that were in effect back when Mr. Penley's evidence was handled in October-November, 1995, versus the policies as they existed at the time of the second trial. The State's theory of exclusion was that the Plano Police Department had enacted "subsequent remedial measures" relating to the handling of blood evidence which should not be mentioned by the defense during this second trial under Rule 407, Texas Rules of Criminal Evidence (III R.R. 192). The State's attorney argued (III R.R. 192-193):

> "This is not an issue. Mr. Murphy well knows. He thinks that something is wrong. He's going to make his case out of the fact that not refrigerating the blood is negligence. And that's exactly what the rule speaks to. If they do that now, for whatever reason that would be a remedial measure, certainly a different practice then they had then, and it's not admissible, Your Honor."

The prosecutor told the Court that "the testimony is going to be that they took the evidence, did not refrigerate it, it was placed into a basket where it waited to be transferred to the lab for 18 days." (III R.R. 193 - 194). The Court sustained the State's objection to the admission of the evidence and

any defense cross-examination on the subject (III R.R. 197). Petitioner then made an offer of proof that included the testimony of Christi Wilson out of the presence and hearing of the jury (III R.R. 200-210).[2]

(ii) The Nature of the Right of Confrontation.

The right of confrontation has ancient roots, and this Court has jealously guarded the right. *Greene v. McElroy*, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959). Over two thousand years ago the Roman Governor Porcius Festus reported to King Agrippa: "It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges." *Coy v. Iowa*, 487 U.S. 1012, 1015-1016, 108 S.Ct. 2798, 2800, 101 L.Ed.2d 857 (1988) (quoting Acts 25:16). *See also*, 5 Wigmore on Evidence (3d ed. 1940) § 1364 (origin of right to confront witnesses).

The right of confrontation was also recognized in English common law. *Salinger v. United States*, 272 U.S. 542, 548, 47 S.Ct. 173, 175, 71 L.Ed. 398 (1926). *See also*,

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[2] This colloquy on the record is included in the Appendix as Appendix C.

Pollitt, The Right of Confrontation: Its History and Modern Dress, 8 J.Pub.L. 381, 384-388 (1959) (describing confrontation of witnesses in England). Initially, the right of the accused to confront witnesses was recognized in trials for treason. Wigmore, at 123. Arguably, the most notorious treason trial in England was that of the Sir Walter Raleigh, accused of conspiring to overthrow the King of England. *See*, F. Heller, The Sixth Amendment to the Constitution, 104 (1968). *See also*, Pollitt, at 388. Raleigh was charged with treason after a third party, Cobham, confessed under torture, to conspiring with Raleigh. At trial, Raleigh was denied the opportunity to confront Cobham and Cobham's statement was used to convict and ultimately execute Raleigh. Pollitt, at 388-389. It was common during these times for an accused to be tried upon written "evidence which consisted solely of *ex parte* affidavits and depositions." *California v. Green*, 399 U.S. 149, 156, 90 S.Ct. 1930, 1934, 26 L.Ed.2d 489 (1970); *Dowdell v. United States*, 221 U.S. 325, 330, 31 S.Ct. 590, 592, 55 L.Ed. 753 (1911) (Purpose of confrontation clause was to exclude accusation by written deposition.); *Mattox v. United States*, 156 U.S. 237, 242-243, 15 S.Ct. 337, 339, 39 L.Ed. 409

(1895) (Confrontation provision enacted to prevent accusation of crime by written deposition at trial). By the seventeenth century the right to confront witnesses had grown in favor. *Coy v. Iowa,* 487 U.S. 1012, 1015-16, 108 S.Ct. 2798, 2800, 101 L.Ed.2d 857 (1988). *See also,* 5 J. Wigmore, Evidence §1395, p. 122 (3d ed. 1940). In *Duke of Dorset v. Girdler* (1720), Finch's Prec. Ch. 531, the right of confrontation was recognized as being fundamental to a fair trial: "The other side ought not be deprived of the opportunity of confronting the witnesses and examining them publicly, which has always been found the most effectual method for discovering the truth." Wigmore, at 123. (Internal quotations omitted.)

Although the right of confrontation had gained wide acceptance in England, it was not originally recognized in the United States Constitution. *Ex parte Milligan,* 71 U.S. (4 Wall) 2, 120, 18 L.Ed. 281 (1866). *See also,* Freely, Malcom M., The Oxford Companion to the Supreme Court of the United States, p. 935 (1992). Its recognition did not occur until the ratification of the Sixth Amendment. U.S.Const. Amend. VI. *See Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 590, 100 S.Ct. 2814, 2834-2835, 65

L.Ed.2d 973 (1980) (Brennan, J., concurring); *California v. Green*, 399 U.S. at 175, 90 S.Ct. at 1943 (Harlan, J., concurring); *United States v. Barracota*, 45 F.Supp. 38, 38 (S.D.N.Y.1942). This Court has since held the right to confrontation is "[o]ne of the fundamental guarantees of life and liberty ... long deemed so essential for the due protection of life and liberty that it is guarded against legislative and judicial action by provisions in the Constitution of the United States and in the constitutions of most if not of all the States composing the Union." *Kirby v. United States*, 174 U.S. 47, 55-56 19 S.Ct. 574, 577, 43 L.Ed. 890 (1899). Indeed, the right of confrontation helps to establish a criminal justice system "in which the perception as well as the reality of fairness prevails." *Lee v. Illinois*, 476 U.S. 530, 540, 106 S.Ct. 2056, 2062, 90 L.Ed.2d 514 (1986).

(iii) The Extent of the Right

The right to confront one's accuser necessarily includes the right to cross-examine. As the Court held in *Davis v. Alaska*:

> The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination. The opponent demands confrontation, not for the

> idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers.

Id., 415 U.S. 308, 315-316, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974) (quoting 5 J. Wigmore, Evidence Section 1395, p. 123 (3d ed. 1940). (Emphasis in original.) *See also, Douglas v. Alabama,* 380 U.S. 415, 419, 85 S.Ct. 1074, 1077, 13 L.Ed.2d 934 (1965) (Jurors were entitled to make informed judgment as to the weight to assign to witness' testimony.); and, *Smith v. Illinois,* 390 U.S. 129, 132, 88 S.Ct. 748, 750, 19 L.Ed.2d 956 (1968) (*citing Alford v. United States,* 282 U.S. 687, 692-694, 51 S.Ct. 218, 219-220, 75 L.Ed. 624 (1931) ("Prejudice ensues from a denial of the opportunity to ... put the weight of [the witness'] testimony and his credibility to the test, without which the jury cannot fairly appraise them.") Confrontation is the check and balance that ensures fairness in our adversary system of justice, and cross-examination is the essential means by which opponents test evidence proffered against them. *Davis,* 415 U.S. at 316, 94 S.Ct. at 1110.

Cross-examination serves three general purposes: cross-examination may serve to identify the witness with his

community so that independent testimony may be sought and offered concerning the witness' reputation for veracity in that community; cross-examination allows the jury to assess the credibility of the witness; and, cross-examination allows facts to be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased. *Alford v. United States*, 282 U.S. 687, 691-92, 51 S.Ct. 218, 219, 75 L.Ed. 624 (1931) (citing *Tla-Koo-Yel-Lee v. United States*, 167 U.S. 274, 17 S.Ct. 855, 42 L.Ed. 166 (1897)). Cross-examination is by nature exploratory and there is no general requirement that the defendant indicate the purpose of his inquiry. *Ibid.* Indeed, the defendant should be granted a wide latitude even though he is unable to state what facts he expects to prove through his cross-examination. *Ibid.*

(iv) Limitation of Cross-examination.

The Confrontation Clause of the Sixth Amendment guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." The right of confrontation, which is secured for defendants in state as well as federal criminal proceedings, *Pointer v. Texas*, 380 U.S. 400 (1965), "means more than being allowed to confront the witness physically." *Davis v. Alaska*, 415 U.S.,

at 315. Indeed, "'[t]he main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination.'" *Id.*, at 315-316 (quoting 5 J. Wigmore, Evidence 1395, p. 123 (3d ed. 1940)) (emphasis in original). Of particular relevance here, "[w]e have recognized that the exposure of a witness' motivation in testifying is [475 U.S. 673, 679] a proper and important function of the constitutionally protected right of cross-examination." *Davis, supra,* at 316-317 (citing *Greene v. McElroy*, 360 U.S. 474, 496 (1959)).

The Constitutional right of confrontation is violated when appropriate cross-examination is limited. *Delaware v. Van Arsdall,* 475 U.S. 673, 682, 106 S.Ct. 1431, 1436-1437, 89 L.Ed.2d 674 (1986). By cutting off all questioning about an event that the State conceded had taken place and that a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony, the court's ruling violated Petitioner's rights secured by the Confrontation Clause. *Id.* This Court has also rejected the notion that a defendant should have to show "outcome determinative" prejudice in order to state a violation of the Confrontation Clause, i.e. that unless the particular limitation

on cross-examination created a reasonable possibility that the jury returned an inaccurate guilty [475 U.S. 673, 680] verdict, that limitation would not violate the Confrontation Clause. The Court has noted that while some constitutional claims by their nature require a showing of prejudice with respect to the trial as a whole, *see, e.g., Strickland v. Washington*, 466 U.S. 668 (1984) (ineffective assistance of counsel), the focus of the Confrontation Clause is on individual witnesses. Accordingly, the Court held in *Delaware v. Van Arsdall* that the focus of the prejudice inquiry in determining whether the confrontation right has been violated must be on the particular witness, not on the outcome of the entire trial. It would be a contradiction in terms to conclude that a defendant denied any opportunity to cross-examine the witnesses against him nonetheless had been afforded his right to "confront[ation]" because use of that right would not have affected the jury's verdict. We think that a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby "to expose to the jury the facts from

which jurors . . . could appropriately draw inferences relating to the reliability of the witness." *Davis v. Alaska, supra,* at 318.

(v) Substantial Issue. A reasonable jury might have received a significantly different impression of the blood evidence used against Mr. Penley had his counsel been permitted to pursue the proposed line of cross-examination regarding the mishandling of the blood evidence in this case along with the police department's changes in policies and procedures to prevent such mishandling of biological evidence in the future.

The Texas Appellate Court held that because the trial court correctly ruled the evidence inadmissible under Rule 407, it would not reach Petitioner's constitutional claims. Petitioner claims that this was error of a constitutional dimension that should be reviewed by this Court. This is the first time in the criminal law area that significant evidence favorable to the theory of defense has been excluded under a rule of evidence that was enacted to apply to civil negligence cases. Because of the mechanistic way in which the trial court applied Rule 407 to exclude the evidence, Petitioner contends that the United States Constitution trumps local

rules of evidence especially whenever it would be "fundamentally unfair" to apply them. Also important is the spectre that federal prosecutors could use the same argument in excluding potentially exculpatory evidence from a jury under the guise of "subsequent remedial measures." "Where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 1049, 35 L.Ed.2d 297 (1973). *See also Green v. Georgia*, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979). Petitioner maintains that the rules of evidence at work in this case, when applied mechanistically to exclude evidence favorable to Petitioner's theory of defense, did precisely that -- defeated the pursuit of the truth and the ends of justice.

ARGUMENT UNDER QUESTION 3

Petitioner's right to testify in his own defense free from prohibited cross-examination as preventing Petitioner from exercising his constitutional right to present a defense.

This Court's precedent establishes that due process of law sets an outer limit on the restrictions that may be placed

on a defendant's ability to raise an effective defense to the State's accusations. In fact, the cases establish that limitations placed on the accused's ability to present a fair and complete defense can, in some circumstances, be severe enough to violate due process. "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). Petitioner's argument is that the trial court's ruling on Petitioner's motion in limine regarding allowable cross-examination by the State upon Petitioner's intended testimony before the jury impeded Petitioner's ability to throw doubt on the State's case and effectively denied Petitioner his right to present a defense.

During the trial at the guilt/innocence phase, the trial court swore Mr. Penley in as a witness and proceeded to advise his of his constitutional right not to testify in the case (IV R.R. 160). The trial judge also advised Mr. Penley that if he did testify, he would be subject to cross-examination by the State (IV R.R. 160-161). As a result of that advice to Mr. Penley, Mr. Penley, through counsel, filed a written Motion in Limine as to the permissible scope of potential cross-

examination of Appellant by the State should he decide to testify (III C.R. 347-349) (IV R.R. 162). The following transpired:

> THE COURT: We are outside the presence of the jury. All parties of trial are present. The defendant's had two DWIs and was off probation for those in 1994, which was three years ago. And the State will get into -- state what are you going to get into, Mr. Waddill?
>
> MR. WADDILL: Judge, what we would seek to elicit from the defendant, if he takes the stand, is evidence regarding his habits and customary practice with regard to his drinking, his consumption of alcohol, typically how often he drinks, what he drinks when he drinks, how much he drinks, and over what periods of time. And if he has in the past when he has been drinking, driven a motor vehicle before. I will make no inquiries to whether he has been caught, convicted, or been on probation.
>
> THE COURT: That's fine. And so you will object to that?
>
> MR. MURPHY: Yes.
>
> THE COURT: Okay. That objection is overruled. I will let the State do that. And being the purpose of the Court in this case to overrule the objection to proceed with an adverse ruling with -- to preserve any error in the Court's ruling in this particular case, and he will not be required to do that in front of the jury.

MR. MURPHY: Okay. I'll make just one last request. In light of the Court's ruling, may I have a moment to talk to my client outside the courtroom?

THE COURT: Oh, by all means. Sure.
(A brief pause.)

MR. MURPHY: Based on the Court's ruling, Mr. Penley has advised that he intends to exercise his Fifth Amendment rights.

THE COURT: That's fine.

* * * * *

The proposition that due process requires a fair opportunity to present a defense in a criminal prosecution is not new. *See Crane v. Kentucky,* 476 U.S. 683, 690 (1986) *California v. Trombetta,* 467 U.S. 479, 485 (1984). In *Chambers,* the defendant had been prevented from cross examining a witness and from presenting witnesses on his own behalf by operation of Mississippi's "voucher" and hearsay rules. The Court held that the application of these evidentiary rules deprived the defendant of a fair trial. "[W]here constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." 410 U. S., at 302.

Chambers is regarded as a prohibition on enforcement of state evidentiary rules that lead, without sufficient justification, to the establishment of guilt by suppression of evidence supporting the defendant's case. In *Crane*, a trial court had held that the defendant could not introduce testimony bearing on the circumstances of his confession, on the grounds that this information bore only on the "voluntariness" of the confession, a matter already resolved. This Court held that by keeping such critical information from the jury this exclusion "deprived petitioner of his fundamental constitutional right to a fair opportunity to present a defense." 476 U. S., at 687. The Court emphasized that, while States have the power to exclude evidence through evidentiary rules that serve the interests of fairness and reliability, limitations on evidence may exceed the bounds of due process where such limitations undermine a defendant's ability to present exculpatory evidence without serving a valid state justification. In *Washington v. Texas*, 388 U.S. 14 (1967), the trial court refused to permit a defense witness to testify on the basis of Texas statutes providing that persons charged or convicted as co-participants in the same crime could not testify for one

another, although they could testify for the State. The Court held that the Constitution prohibited a State from establishing rules to prevent whole categories of defense witnesses from testifying out of a belief that such witnesses were untrustworthy. Such action by the State detracted too severely and arbitrarily from the defendant's right to call witnesses in his favor.

These cases, taken together, illuminate a simple principle: Due process demands that a criminal defendant be afforded a fair opportunity to defend against the State's accusations. Meaningful adversarial testing of the State's case requires that the defendant not be prevented from raising an effective defense, which must include the right to present relevant, probative evidence.

Here, the trial judge misapplied Texas Rules of Evidence in holding that the State would be allowed to cross-examine Petitioner in areas that were impermissible under Texas Rules of Evidence. As a result of the court's ruling on Petitioner's Motion in Limine, Petitioner made a determination that he would not testify as a witness in his own defense because of the risk that erroneously permitted

cross-examination would unfairly and unduly prejudice his defense.

The Sixth Amendment provides that "the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor." Because this right "is an essential attribute of the adversary system itself," this Court has repeatedly stated that few rights "are more fundamental than that of an accused to present witnesses in his own defense."[3] According to Joseph Story, that provision was included in the Bill of Rights in reaction to a notorious common-law rule categorically excluding defense evidence in treason and felony cases.[4] This Court's holding in

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[3] "Few rights are more fundamental than that of an accused to present witnesses in his own defense, *see, e.g., Chambers v. Mississippi,* 410 U.S. 284, 302 (1973). Indeed, this right is an essential attribute of the adversary system itself. ... The right to compel a witness' presence in the courtroom could not protect the integrity of the adversary process if it did not embrace the right to have the witness' testimony heard by the trier of fact. The right to offer testimony is thus grounded in the Sixth Amendment ... ." *Taylor v. Illinois,* 484 U.S. 400, 408—409 (1988).

[4] "Joseph Story, in his famous Commentaries on the Constitution of the United States, observed that the right to compulsory process was included in the Bill of Rights in reaction to the notorious common-law rule that in cases of treason or felony the accused was not allowed to introduce witnesses in his defense at all. Although the absolute

Washington v. Texas, 388 U.S. 14 (1967), that this right is applicable to the States, rested on the premises that it "is in plain terms the right to present a defense" and that it "is a fundamental element of due process of law." "Any rule that impedes the discovery of truth in a court of law impedes as well the doing of justice." *Hawkins v. United States*, 358 U.S. 74, 81 (1958) (Stewart, J., concurring).

State evidentiary rules may so seriously impede the discovery of truth, "as well as the doing of justice," that they preclude the "meaningful opportunity to present a complete defense" that is guaranteed by the Constitution, *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (internal quotation marks omitted). In *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973), the Court concluded that "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." As the Court

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prohibition of witnesses for the defense had been abolished in England by statute before 1787, the Framers of the Constitution felt it necessary specifically to provide that defendants in criminal cases should be provided the means of obtaining witnesses so that their own evidence, as well as the prosecution's, might be evaluated by the jury." *Washington v. Texas*, 388 U.S. 14, 19-20 (1967) (footnotes omitted).

notes today, restrictions on the "defendant's right to present relevant evidence," ante, at 4, must comply with the admonition in *Rock v. Arkansas*, 483 U.S. 44, 56 (1987), that they "may not be arbitrary or disproportionate to the purposes they are designed to serve." Applying that admonition to Arkansas' blanket rule prohibiting the admission of hypnotically refreshed testimony, we concluded that a "State's legitimate interest in barring unreliable evidence does not extend to per se exclusions that may be reliable in an individual case." *Id.*, at 61. This statement of constitutional law is directly relevant to this case.

As previously stated, Petitioner's contention is that the State intended to ask Petitioner specifically "And if he has in the past when he has been drinking, driven a motor vehicle before." (See Ct. App. Slip Op. at 18). This is precisely what Rule 404(b) is designed to protect against -- action in conformity with prior behavior. If Mr. Penley admitted to drinking and driving on prior occasions this is evidence that the jury would use to convict because he acted in conformity therewith on the occasion in question. TEX.R.EVID. 404(b). If Mr. Penley denied prior drinking and driving, the State would then use his prior misdemeanor

DWI convictions to impeach his testimony. The issue was plain in this case. Was Mr. Penley intoxicated on the occasion in question -- not whether he had driven while intoxicated in the past. The trial court's misapplication of the Texas Rules of Evidence effectively prevented Petitioner from testifying in his own behalf and presenting a defense.

CONCLUSION

For these various reasons, this Petition for a Writ of Certiorari should be granted. Petitioner prays therefore that that the Petition for Writ of Certiorari be granted and that upon full consideration the Court reverse the decision of the Texas Court of Appeals, Sixth Supreme Judicial District at Texarkana, Texas; and that Petitioner be granted a new trial with instructions consistent with the arguments advanced herein.

Respectfully submitted,

James M. Murphy
Texas Bar No. 14700800
P. O. Box 140809
Dallas, Texas 75214
214-745-1532
Counsel for Petitioner

April 10, 2000.

NO._____

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1999

PAUL CHRISTOPHER PENLEY,
Petitioner,

vs.

THE STATE OF TEXAS,
Respondent.

APPENDIX

JAMES M. MURPHY
Texas State Bar # 14700800
P.O. Box 140809
Dallas, Texas 75214
214-745-1532 (Telephone)
214-823-1816 (Facsimile)

Counsel for Petitioner

April 10, 2000

In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-98-00082-CR

PAUL CHRISTOPHER PENLEY, Appellant
v.
THE STATE OF TEXAS, Appellee

On Appeal from the 380th Judicial District Court
Collin County, Texas
Trial Court No. 380-81132-97

Before Cornelius, C.J., Grant and Ross, JJ.
Opinion by Justice Grant

OPINION

Paul Christopher Penley was charged by indictment for the offense of intoxication manslaughter. The first trial ended in a hung jury. In the second trial, the jury found Penley guilty and assessed punishment at fourteen years' confinem6nt in the Texas Department of Criminal Justice, institutional division and a $10,000 fine. Penley appeals his conviction.

In six points of error, Penley contends (1) the trial court erred in admitting into evidence State's exhibits 23 and

23A which contained blood drawn from Penley on the day of the accident; (2) the trial court committed material error likely to injure Penley's rights when it deprived him of his federal and state rights of confrontation and cross-examination of State's witnesses, Christi Wilson and Sandy Collins; (3) the trial court committed material error likely to injure Penley's rights when it excluded evidence he offered of changes in the policy of handling blood evidence on cross-examination of State's witness Christi Wilson; (4) the trial court committed material error likely to injure Penley's rights when it denied his motion in limine; (5) the trial court erred in refusing to grant him a new trial when it was shown on a proper motion for new trial th4t there was jury misconduct; and (6) the trial court erred in admitting expert testimony by police officer Sammy Knapp.

There is evidence showing that on Sunday, October 1, 1995, at approximately 10:30p.m., Shalom Diaz and her sister, Shanasy Heines, went to a dance club on Greenville Avenue in Dallas. While at the club, Penley bought them a drink. Penley and the sisters left the dance club together at approximately 2:00 a.m. They went to a tattoo parlor near downtown, but returned to the parking lot of the dance club

after finding the tattoo parlor closed. Diaz fell asleep in the back seat of her sister's car, and Penley and Heines got into Penley's car, which was parked nearby. Penley and Heines began kissing and became intimate.

Around 5 a.m., Officer Bryan Topp awoke Diaz, asked her for identification, and told her to go home. Officer Topp went over to Penley's car and knocked on the window. The door opened, and Officer Topp saw two nude individuals, who were later identified as Penley and Heines. Officer Topp testified that in his opinion, Heines was extremely intoxicated. Officer Topp smelled a slight odor of alcohol on Penley's breath, but Penley did not exhibit any signs of intoxication. Officer Topp allowed Diaz, who was sober, to drive Heines home. Penley told Officer Topp that he was visiting Dallas, that he did not have a place to stay, and that he was spending the night in the parking lot. Officer Topp testified he would have let Penley drive away from the parking lot, but Penley had indicated he was going to stay there.

Around 6:25 a.m., Melissa Fitzgerald was on her way to work, traveling westbound on Highway 121. She noticed a white Cadillac in front of her crossing the center line and

weaving in and out of traffic. Fitzgerald testified that as she approached the intersection of Highway 121 and Custer Road, she saw the white Cadillac run into a Dodge Colt that was stopped at the red light. The impact pushed the Colt into the intersection, and the Colt hit the right rear panel of another car turning left onto Highway 121. The driver of the white Cadillac, who was later identified as Penley, got out of his car and tried to open the door of the Colt. Fitzgerald went over to aid Penley and noticed a strong smell of alcohol on his breath. Fitzgerald testified that shortly thereafter, Penley went over to his car and returned with the smell of mouthwash on his breath. Fitzgerald testified that she did not notice any signs of life from the passenger. Kristine Marie Flood, the driver of-the Colt, died as a result of the accident.

Sammy Knapp, a motorcycle officer with the Plano Police Department, arrived at the scene at 6:40 a.m. Officer Knapp testified that he smelled a moderate odor of alcohol on Penley. Officer Knapp asked Penley if he had been drinking, and Penley said no. Officer Knapp asked Penley to get his insurance information, and when he returned, Officer Knapp testified that Penley had the sweet smell of mouthwash on his breath. Officer Knapp asked Penley again

if he had been drinking and Penley said he had had three Crown Royals and Coke. Penley told Officer Knapp he looked down to adjust his radio, and when he looked up, he saw another car in front of him, and he hit the other car. Other than the smell of alcohol on his breath, Officer Knapp testified that Penley did not exhibit any signs of intoxication.

Two other officers joined Officer Knapp at the scene, Officers Matt Dawson and Larry Frazier. Officer Dawson performed two horizontal gaze nystagmus ("HGN") tests on Penley and determined that Penley was intoxicated. Officers Dawson and Frazier took Penley to a nearby hospital where nurse Molly Golson drew a blood sample from Penley. After the blood sample was drawn, Officers Dawson and Frazier took Penley to the police station. While in the patrol car on the way to the station, the officers noticed the smell of alcohol in the car. At the station, Officer Knapp made a videotape of Penley.

Kenneth Evans, a chemist with the Department of Public Safety (D.P.S.), tested the blood sample, and he testified the results showed Penley had 0.10 grams of alcohol per 100 milliliters of blood, showing that Penley was legally intoxicated at the time of the blood draw. Ron Oliver, the

State's expert on intoxication matters, testified that at the time of the accident (approximately 6:30 am.), Penley's blood alcohol level would have been between .125 and .154.

Penley contends the trial court erred in admitting the blood evidence (State's exhibits 23 and 23A) because the State failed to show the requisite chain of custody necessary to establish that the blood sample admitted and tested by Evans was the same blood sample taken from Penley. State's exhibit 23 is a mailing tube containing a vial (State's exhibit 23A) of Penley's blood (hereinafter blood evidence). Penley contends there was a break in the chain of custody between Officer Dawson and Christi Wilson, a property evidence specialist with the Plano Police Department. Penley argues that the blood evidence was the critical fact that led to his conviction and that without a proper showing of the chain of custody from the time the blood was drawn until it was tested at the D.P.S. laboratory, his conviction cannot stand. The State contends Penley waived this point of error because he made a general objection which is insufficient to preserve error on appeal.

To preserve a complaint for our review, a party must have presented to the trial court a timely request, objection,

or motion that states the specific grounds for the desired ruling, if they are not apparent from the context of the request, objection, or motion.[1] If a party fails to do this, error is not preserved, and the complaint is waived.[2] Penley objected that no proper foundation had been laid for State's exhibits 23 and 23A and that the exhibits were hearsay and, thus, not admissible. Upon reviewing the testimony prior to the objection, we find Penley's objection was sufficient to apprise the judge that he was complaining about a break in the chain of custody.

Penley claims there was a break in the chain of custody because of several inconsistencies in the testimony of Officers Knapp, Dawson, and Frazier, and property evidence specialist Wilson: (1) Officer Dawson testified that he personally gave the blood evidence to Wilson at 9:25 a.m. on October 2, 1995; that he did not turn in the D.W.I. videotape made by Officer Knapp; and that it was not his handwriting that listed the D.W.I. videotape in the

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[1] *See* TEX. R. App. P. 33.1(a)(1).

[2] *See Taylor v. State*, 939 S.W.2d 148, 155 (Tex. Crim. App. 1996).

description section on the property evidence tag; (2) Officer Frazier testified that Officer Knapp was present at the time of the blood draw, but Officer Knapp testified that he was not in the room during the blood draw; and (3) Wilson testified that she did not receive the blood evidence personally from Officer Dawson, but that she checked in the blood and the D.W.I. videotape after retrieving them from the evidence locker at noon on October 2, 1995. Penley contends these inconsistencies and the absence of any writing signed by nurse Molly Golson indicating she drew the sample of blood indicates a break in the chain of custody.

In order for the results of a blood test to be admissible in evidence, a proper chain of custody of the blood sample that was drawn from the accused and later tested must be established.[3] Proof of the beginning and the end of the chain will support admission of the evidence barring any showing of tampering or alteration.[4] Any gaps

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[3] *Moone v. State*, 728 S.W.2d 928,930 (Tex. App.-Houston [14th Dist.] 1987, no pet.) (citing *Brown v. State, 156* Tex. Crim. 144,240 S.W.2d 310, 311 (Tex. Crim. App. 1951); *Lynch v. State*, 687 S.W.2d 76, 77-78 (Tex. App.-Amarillo 1985, pet. refd)).

[4] *See Stoker v. State*, 788 S.W.2d 1,10 (Tex. Crim. App. 1989); *Mello v. State*, 806 S.W.2d 875, 878 (Tex. App. - Eastland 1991, pet. refd).

in the chain go to the weight of the evidence rather than to its admissibility.[5]

Wilson testified that as a property evidence specialist, she is in charge of the care, custody, and control of evidence brought to the police department. Wilson testified that the officers can either give the evidence to her, they can drop it into lockers, or they can drop it into a mailbox. Once an officer puts evidence in a locker or in a mailbox, the only people who can retrieve it are herself, Sandy Collins, another property evidence specialist, and their supervisor, Ben Armstrong. Wilson testified that when officers turn in evidence, they have to fill out a property evidence tag (a white card or sheet) describing the evidence, date, and time. The card goes into evidence with the actual property.

When Wilson retrieves evidence from the lockers or the mailbox, she writes down the time she checks in the evidence, and if she personally receives evidence from an

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[5] *See Stoker*, 788 S.W.2d at 10; *Mello*, *806* S.W.2d at 878 (citing *Deck* v. *State*, *651* S.W.2d 827 (Tex. App.-Houston [1st Dist.] 1983, no pet.)).

officer, she not only notes the time, but she also checks a box labeled *in person* on the property evidence tag. After she receives the property, she fills out a yellow tag with the file number, her initials, the item number, and the date and she assigns a bin location to the item. This yellow tag is attached to every piece of evidence she receives.

On October 2, 1995, Wilson checked in the mailing tube and the vial at noon. The blood evidence was accompanied by a property evidence tag from Officer Dawson. Wilson testified that she retrieved the blood evidence from a locker and that she did not receive it in person from Officer Dawson because she had not checked the "in person" box on the property evidence tag. The property evidence tag (exhibit 22) showed that Officer Dawson submitted the evidence at 9:25 a.m. It described two items: (1) the D.P.S. mailing tube containing the vial of Penley's blood, and (2) a videotape of Penley's D.W.I. interview. Wilson testified that State's exhibit 23 containing State's exhibit 23A was the same tube that Officer Dawson turned into evidence because the file number on the tube matched the file number on the property evidence tag.

The record reflects that Penley signed the consent

form giving permission for the blood draw and that Officer Knapp read the mandatory D.W.I. warnings to Penley before he gave his consent. Officer Dawson testified that he took one blood tube kit with him to the hospital and that Nurse Golson cleaned Penley's arm with betadine before drawing his blood. (Betadine does not contain alcohol; therefore, when using betadine there is no danger of a positive result for alcohol.) Officer Dawson testified that he was present during the entire blood draw, that he never left the room, and that Nurse Golson drew Penley's blood and placed it into the blood vial.

After she put the blood in the vial, she handed the vial to Officer Dawson. Officer Dawson testified that the vial was placed in a tube similar to a mailing tube and the tube was sealed. Officer Dawson testified that State's exhibit 23 was the same tube that he put the vial in because of the way it was marked. He testified that both he and Officer Knapp filled out the labels for the tube and sealed it and that it was the same blood vial because it had Officer Knapp's signature on it. After putting the blood vial in the tube, Officer Dawson kept the tube in his possession until he turned it over to Wilson at 9:25 a.m. Officer Dawson

testified that in his report he stated that he gave the sample to Wilson, but he did not distinctly remember going to Wilson's office and handing the sample to her. He testified that he personally gave the evidence to Wilson because that was what his report stated. He testified that he did not drop off the D.W.I. videotape, but that he did drop off the blood evidence. He testified that he filled out the property evidence tag because it was in his handwriting, but he also testified that the listing on the property evidence tag for the D.W.I. videotape was not in his handwriting. Officer Knapp testified that he left the room prior to the blood draw to check on the driver of the Colt and that he returned about ten minutes later.

Wilson testified that she retrieved from a locker the blood sample and the D.W.I. videotape, along with the property evidence tag. She testified that she checked in the tube, filled out a yellow tag, attached it to the tube, and placed it in a basket in the office. She testified that the office is inside the police department and is secure. Only Collins, Armstrong, and she have the key to the office. She testified that the evidence stayed in the basket until Collins took it to the D.P.S. laboratory on October 20, 1995, that it was picked

up from the D.P.S. laboratory on December 20, 1995, and that it was taken directly to the property room at Piano City Hall, where it was placed in the bin number assigned to it. Wilson testified that the blood sample was never mishandled, lost, or handled by anyone other than herself or Collins after Officer Dawson dropped it off.

Collins also testified that the office where the basket was located is locked when she, Wilson, or Armstrong are not in the office and that any evidence to be taken to the D.P.S. laboratory is placed in the wire basket. When they accumulate enough evidence for testing, either she or Wilson take the basket to the D.P.S. laboratory. She testified that she took State's exhibit 23 to the D.P.S. laboratory on October 20, 1995, and hand-delivered it to an employee of the laboratory. The laboratory stamped the yellow tag with the date the evidence was received. Underneath the stamp, she placed her signature. Collins testified that she also fills out an acceptance form, which is signed by her, the laboratory employee who takes the evidence, and all the other employees who are in the laboratory at that time. The acceptance form is dated and timed.

Evans testified that he received a blood sample

brought in by Sandy Collins on October 20, 1995, that he assigned it a number, and that State's exhibit 23 had the same number as the tube he received that day. Evans testified he performed the blood analysis and that State's exhibit 23A contained the same blood as the blood he analyzed because it had the laboratory case number and his initials on it.

Based on the foregoing testimony, we find there is sufficient proof of the chain of custody. Officer Dawson's testimony that he handed the blood evidence to Wilson is not a break in the chain of custody because he testified that he turned the evidence over at 9:25 a.m. and Wilson testified that she retrieved the evidence from the secured locker. The fact that she retrieved both the D.W.I. videotape and the tube and vial from the locker does not indicate a break in the chain of custody. The blood evidence was accounted for from the time the blood was drawn until the time that Evans identified State's exhibit 23A at trial as being the same blood that he tested. Further, any break in the chain of custody would only go to the weight and not to the admissibility of the evidence.[6] This point of error is overruled.

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[6] *See Stoker,* 788 S.W.2d at 10; *Mello,* 806 S.W.2d at 878.

In his next two points of error, Penley contends the trial court committed material error likely to injure his rights (1) when it deprived him of his Texas and federal rights of confrontation and cross-examination, and (2) when it excluded evidence of policy changes concerning the handling of blood evidence after Penley's first trial in 1996. Prior to Wilson's testimony, the State made a motion in limine to prevent Penley from offering evidence on the Plano Police Department's policy changes with regard to the handling of blood evidence after the first trial. The State argued that the evidence of policy changes should be excluded because Penley's "expert at the last trial said that it [the failure to refrigerate the blood] was mishandling of the evidence and was negligent." In his brief, Penley states that his expert, Dr. William T. Lowry, testified during the first trial that the handling of the blood evidence made any testing of Penley's blood sample unreliable. Dr. Lowry said the testing was unreliable because of the way the blood was drawn and because the blood was stored at room temperature for eighteen days before it was tested. The trial court granted

the motion in limine under Rule 407 of the Texas Rules of Criminal Evidence.[7] In an offer of proof, Penley elicited testimony from Wilson that because of Penley's first trial, the department now refrigerates all blood samples and sends evidence for testing every week. Penley contends that the trial court -improperly excluded this evidence and that the effect of its exclusion was to deprive him of his right to confrontation and cross-examination of the State's witnesses, Wilson and Collins.

An appellate court reviews a trial court's decision to admit or exclude evidence under an abuse of discretion standard.[8] An appellate court reverses a trial court's ruling if is was not within the zone of reasonable disagreement.[9] The general rule is that the granting of a motion in limine filed by the State does not preserve error for appeal.[10] Here, Penley

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[7] The Texas Rules of Criminal Evidence were in effect at the time of trial, but have since been superseded by the Rules of Evidence, which became effective on March I, 1998.

[8] *Green v. State,* 934 S~W.2d 92, 101-02 (Tex. Crim. App. 1996).

[9] *Id.* at 102.

[10] *See Norman v. State,* 523 S.W.2d 669, 671 (Tex. Crim. App. 1975).

preserved error because he made an offer of proof."[11]

Rule 407 of the Texas Rules of Criminal Evidence states

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent remedial measures are not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent remedial measures when offered for another purpose, such as proving ownership, control or feasibility of precautionary measures, if controverted, or impeachment.[12]

Subsequent remedial measures can take many forms: repairs, installation of safety devices, changes in policy, design changes, providing or modifying warnings, or the firing of an employee.[13] The two reasons for exclusion are generally that (1) the rule encourages safety precautions,[14] and (2) the

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[11] *See Basham v. State*, 608 S.W.2d 677, 679 (Tex. Crim. App. [Panel Op.] 1980).

[12] TEX. R. CRIM. EVID. 407(a) (Vernon 1997) (now TEX. R. EVID. 407(a)).

[13] 1 STEVEN GOODE ET AL, TEXAS PRACTICE: GUIDE TO THE TEXAS RULES OF EVIDENCE: CIVIL AND CRIMINAL § 407.1 (2d ed. 1993).

[14] 2 WIENSTEIN'S FED. EVID.2d § 407.03[l] (Matthew Bender & Co. ed., 1998).

rule excludes unreliable evidence.[15] Rule 407 is found within the Texas Rules of Civil Evidence and the Texas Rules of Criminal Evidence. The language in each is the same. We did not find any cases construing the criminal rule; therefore, we will cite cases construing the civil rule.

The event here was Dr. Lowry's testimony during the first trial that the police department's handling of the blood evidence made the testing of the blood sample unreliable. It is undisputed that Penley's blood sample was stored unrefrigerated for eighteen days before being sent to the D.P.S. laboratory. Now, department policy requires that all blood samples be refrigerated and that all evidence needing analysis be sent to the D.P.S. laboratory once a week. During Penley's offer of proof, Wilson testified that the policy change was a safety measure, a precautionary measure, and was, from her understanding, not something that would improve the reliability of the evidence.

For the evidence to be excludable under Rule 407, the remedial action must meet three requirements: (1) the measure must have been taken subsequent to the event, (2) in

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[15] *Id.* at §407.03 [2].

response to the event, and (3) by a party to the proceeding.[16] In the instant case, the policy change took place after Penley's first trial and in response to Dr. Lowry's testimony during that trial. The policy change made the event less likely to occur, i.e., the policy change made it less likely an expert would attack the reliability of the blood evidence for lack of refrigeration, and the change was made by a party to the suit, the State. Therefore, the policy change here meets the requirements for exclusion under the rule.

Dr. William Rohr, the medical examiner for Collin County, testified that it is important in some instances to refrigerate a blood sample.

> [S]ome of the reasons [are] that sometimes some of the blood tubes that come in do not have any preservative in the tubes, therefore, you need to immediately refrigerate those samples because if you do not, those tubes, the blood in there could deteriorate. Deterioration. It could be putrefied. It could coagulate. So you would need to take precautions on those types of samples.

Dr. Rohr testified that putrefaction is the growth of bacteria

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[16] *See* Wendy Hunkele, *Admissibility of Subsequent Remedial Measures as Evidence in Texas*, 20 ST. MARY'S L.J. 121, 122-23(1988).

in the blood.

Evans testified that he has tested thousands of samples of blood over a period of seventeen years and Penley's blood sample did not appear to be contaminated in any way. Blood can be contaminated if it is putrefied or coagulated.

Penley's blood was stored in a "gray-top tube" or gray-top Vacutainer. Dr. Rohr testified that gray-top tubes contain an anticoagulant and a chemical preservative to inhibit bacterial growth. When asked whether there would be any problem with blood that was stored in a gray-top tube for eighteen days at room temperature, Dr. Rohr testified that there would not be any problem with the blood and that there would be no growth of alcohol in the blood during that time. Officer Dawson testified that he mixed Penley's blood with the anticoagulant, a white powdery substance in the bottom of the vial.

Penley contends that Wilson controverted the feasibility of the precautionary measures in her testimony during the offer of proof, and because she did so, evidence of the subsequent remedial impracticable, nor does Wilson contend that taking the evidence to the D.P.S. laboratory on a more

frequent basis is unfeasible or impracticable.[17]

Next, Penley contends that the Piano Police Department is a third party and, therefore, evidence on the policy changes is admissible against the State because it was the police department and not the State that made the policy changes. Penley directs our attention to Rule 407 of the Federal Rules[18] and case law interpreting it which holds that federal Rule 407 does not exclude evidence of subsequent remedial measures made by a third party, because the policy behind the rule is not served in such instances. Contrary to Penley's assertion, the Plano Police Department is not a third party, but is an arm of the State and as such it is a party to the action.[19]

The policy changes were being offered to show that

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[17] *See, e.g., Brookshire Bros., Inc. v. Lewis, 911* S.W.2d 791, *796* (Tex. App-Tyler 1995, writ denied).

[18] FED. R. Evid. 407.

[19] *See State v. Hernandez> 842* S.W.2d 306, 316 (Tex. App-San Antonio 1992, pet. refd) *on remand, 894* S.W.2d 807 (Tex. App.-San Antonio 1994, pet. refd); *Smith v. State,* 828 S.W.2d 495, 496 (Tex. App-El Paso 1992, no pet.); *Young v. State,* 820 S.W.2d 180,189 (Tex. App-Dallas 1991, pet. refd); *see also Michigan v. Jackson, 475* U.S. 625, 634, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986).

the police department was negligent in its handling of the blood and that its negligence made the subsequent testing and results of the testing unreliable. This is the type of evidence the rule was meant to cover. Further, the evidence reflects that the blood was not contaminated, nor were the results unreliable. Wilson testified that the measure was precautionary in nature, which is the policy behind the rule. Penley did not present an expert witness to refute the reliability of the blood evidence. The trial court did not abuse its discretion when it excluded the evidence of this subsequent remedial measure. Because the trial court correctly ruled the evidence was inadmissible, we do not reach Penley's arguments that he was deprived of his Texas and federal rights of confrontation and cross-examination of the State's witnesses, Wilson and Collins. These points of error are overruled.

The discussion of the remaining points of error do not meet the criteria for publication, thus we order that they not be published. TEX.R.APP.P. 47.3 & 47.4.

The judgment is affirmed.

Date Submitted: July 27, 1999
Date Decided: August 23, 1999
Publish

/s/
Ben Z. Grant
Justice

Next, Penley contends the trial court committed material error likely to injure his rights when it denied his motion in limine, which sought to exclude (1) evidence of Penley's character traits relative to his drinking habits, in contravention of Rule 404(a)(l);[20] (2) evidence of other crimes, wrongs, or acts, i.e., whether Penley had previously driven while intoxicated, in contravention of Rule 404(b); (3) habit evidence under Rule 406; (4) evidence of Penley's character as a witness under Rule 608(a); (5) evidence of specific instances of Penley's conduct under Rule 608(b); and (6) evidence of other crimes that are not felonies and that did not involve moral turpitude under Rule 609(a), i.e., Penley's two prior D.W.I. convictions, if he had previously denied driving while intoxicated.[21] Prior to the hearing on the motion in limine, the trial court apprised Penley of his Fifth Amendment right not to testify Penley argues the effect of the trial court's ruling was to allow the State to show that

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[20] All references to rules contained in the motion in limine refer to the Texas Rules of Criminal Evidence.

[21] TEX.R.CRIM. EVID. 404(a)(l), (b); 406; 608(a), (b); 609(a) (Vernon 1997) (now TEX. R. EVID. 404(a)(l), (b); 406; 608(a), (b); 609(a).

Penley acted in conformity with his prior behavior on the day of the accident, thus making it more likely the jury would convict him. After the trial court denied his motion in limine, Penley chose not to testify. Penley argues that the trial court's ruling chilled his right to testify in his own behalf and to present a defense, because he risked improper cross-examination and impeachment by the State.

A brief recitation of the facts surrounding the motion in limine is necessary. The motion was not a pretrial motion in limine. Penley tendered it during the trial in a hearing outside the presence of the jury. The following exchange took place:

> MR. MURPHY [Defense Counsel]: In that regard, Your Honor, on the record, I'm tendering to the Court the original of the Defendant's Motion in Limine with respect to the defendant's testimony - should he elect to do that after appropriate conference with counsel.
>
> THE COURT: We are outside the presence of the jury. All parties of trial are present.
>
> The defendant's [sic] has two DWIs and was off probation for those in 1994, which was three years ago. And the State will got into -- state what are you going to get into, Mr. Waddill?
>
> MR. WADDILL [Prosecutor]: Judge, what we would seek to elicit from the defendant, if he takes

the stand, is evidence regarding his habits and customary practice with regard to his drinking, his consumption of alcohol, typically how often he drinks, what he drinks when he drinks, how much he drinks, and over what periods of time. And if he has in the past when he has been drinking, driven a motor vehicle before. I will make no inquiries to whether he has been caught, convicted, or been on probation.

THE COURT: That's fine. And so you will object to that.

MR. MURPHY: Yes.

THE COURT: Okay. That objection is overruled. I will let the State do that. And being the purpose of the Count in this case to overrule the objection to proceed with an adverse ruling with -- to preserve any error in the Court's ruling in this particular case, and he will not be required to do that in front of the jury.

MR. MURPHY: Okay. I'll make just one last request. In light of the Court's ruling, may I have a moment to talk to my client outside the courtroom?

THE COURT: Oh, by all means. Sure.

MR. MURPHY: Based on the Court's ruling, Mr. Penley has advised that he intends to exercise his Fifth Amendment rights.

The Court overruled Penley's motion in limine except with respect to Penley's objections to evidence of specific instances of conduct and prior convictions, because the prosecutor stated he did not intend to offer such evidence.

Therefore, Penley preserved error with respect to the State's proposed evidence by objecting and obtaining a ruling on his objection, and by obtaining a running objection to the subsequent introduction of the State's proposed evidence. Although Penley did not state the grounds for his objection, it was apparent from the context that he, was objecting on the basis that the evidence would violate Rule 404(a), (b), and Rule 406. Therefore, we will review whether the trial court erred when it ruled that it would allow such evidence to be admitted. We note, however, that the State did not introduce the objected-to evidence because Penley chose not to testify.

Evidence of other acts is not admissible to prove the character of the person to show that he acted in conformity therewith on the occasion in question.[22] Extraneous acts may be admissible if -they have relevance apart from their tendency to prove the character of the accused.[23] The evidence may be admissible for other purposes, such as

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[22] *See* TEX. R.CRIM.EVID. 404(b); *Montgomery v. State,* 810 S.W.2d 372, 386 (Tex. Crim. App. 1990) (opinion on reh'g).

[23] *See Montgomery,* 810 S.W.2d at 387.

proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.[24] It must also be remembered that the enumerated exceptions to Rule 404(b) are neither mutually exclusive nor collectively exhaustive.[25]A party may introduce prior acts where they logically serve to make more or less probable 1) an elemental fact, or 2) an evidentiary fact which inferentially supports or challenges an elemental fact.[26] Extraneous acts evidence is admissible to rebut a defensive theory.[27]

Therefore, evidence of extraneous acts must be shown to be relevant, apart from character conformity, before it may be admitted into evidence.[28] If relevant, the extraneous acts must be shown to have more probative value than prejudicial

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[24] TEX. R. CRIM. EVID. 404(b).

[25] *Montgomery, 810* S.W.2d at 377.

[26] *Id. at 387.*

[27] *Crank v. State,* 761 S.W.2d 328, 341 (Tex. Crim. App. 1988), *overr. on other grounds, Alford v. State,* 866 S.W.2d 619, 624 (Tex. Crim. App. 1993).

[28] *See Alba v. State,* 905 S.W.2d 581, 585 (Tex. Crim. App. 1995).

impact.[29] However, the trial court does not engage in this balancing test unless the opponent of the evidence further objects under Rule 403. Penley did not object under Rule 403[30] so we will not address the rule's requirements.

Whether evidence of other acts has relevance apart from character conformity, so as to be admissible, is a question for the trial court, subject to an abuse of discretion standard of review.[31] On appellate review, this Court defers to the trial court's decision respecting admission of extraneous acts evidence and overrules the trial court's decision only upon finding that the decision was outside the bounds of reasonable disagreement.[32]

Penley's defensive theory was that he was drowsy and changing the radio dial when the accident occurred. Penley disputed the State's allegations that he was intoxicated. He

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[29] *See id.*

[30] TEX. R. CRIM. EVID. 403 (Vernon 1997) (now TEX. R. EVID. 403).

[31] TEX. R. CRiM. EVID. 404(b); *Lum v. State,* 903 S.W.2d 365 (Tex. App.-Texarkana 1995, pet. refd).

[32] *See Rogers v. State,* 853 S.W.2d 29, 32 (Tex. Crim. App. 1993).

directs our attention to Officer Topp's testimony that he did not show signs of intoxication and that he would have allowed Penley to drive home. Penley also directs our attention to the fact that other witnesses testified that he was not stumbling, slurring his speech, or acting in a manner consistent with an intoxicated person after the accident. In his brief, Penley argues that this evidence shows that he was not intoxicated at the time of the accident.

Ron Oliver, the State's expert witness on intoxication matters, testified that it is possible for some people to have a blood alcohol level of .125 to .154 and not have slurred speech. He testified that most social drinkers do not exhibit gross outward signs of intoxication, such as stumbling or loss of muscle control. When asked what would" account for that, Oliver answered, "Experience with alcohol. Tolerance. The use of alcohol over the years . . . ." He further explained that individuals can build up a tolerance to alcohol and that their bodies can adapt to alcohol being present. He testified that experienced drinkers can eliminate alcohol more quickly from their bodies. Had the State elicited testimony from Penley concerning his drinking habits, it would have rebutted his defensive theory that his actions showed he was not

intoxicated at the time of the accident. Thus, this evidence would have made an elemental fact, Penley's intoxication, more probable. The trial court did not err when it ruled that evidence on Penley's drinking habits was admissible, because the State was not offering the evidence simply to show he acted in conformity with those habits prior to the accident and because the State stated it did not intend to offer evidence of other convictions or specific instances of conduct. Evidence of a person's habits is relevant to show that the conduct of the person on a particular occasion was in conformity with the habit.[33] This point of error is overruled.

Next, Penley contends the trial court erred in refusing to grant him a new trial when there was jury misconduct. Penley filed a motion for new trial contending there was jury misconduct after the guilty verdict was returned on Friday, but before the punishment phase of the trial began the following Monday. Penley contends the evidence admitted during the hearing on the motion for new trial shows (1) Sharon Blewitt, the jury foreperson, talked with another person about the case; and (2) some of the jurors read a

[33] TEX. R. CRIM. EVID. 407.

newspaper article about the case over the weekend which they discussed in the jury room on Monday. In her affidavit, which was admitted during the hearing on the motion for new trial, Blewitt stated that a friend had informed her she had read a newspaper article stating that Penley had been tried previously for the same offense and that the first trial had ended in a hung jury. Blewitt's affidavit also stated that

> [T]he jury returned to Court for the punishment phase of the trial and rendered its verdict on punishment. At that time, some of the jurors mentioned that the case had been reported in the newspaper over the weekend and commented on its contents in my presence.

The granting or denial of a motion for new trial is a matter within the trial court's discretion.[34] First, we will examine Blewitt's conversation with her friend about the statement in the newspaper article that Penley's first trial had ended in a hung jury. Article 36.22 of the Texas Code of Criminal Procedure states that no person shall converse with a juror about the case on trial except in the presence and by the

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[34] *State v. Gonzalez*, 855 S.W.2d 692, 696 (Tex. Crim. App. 1993).

permission of the court.[35] The purpose of the article is to prevent an outsider from saying something that might influence a juror.[36]

When a juror converses with an unauthorized person, injury is presumed.[37] It is the defendant's burden, however, to establish that, if a conversation did occur between a juror and someone else, the discussion involved matters concerning the specific case at trial.[38] However, the presumption is rebuttable if it is shown that the case was not discussed or that nothing prejudicial to the accused was said; then, appellant has not been injured and the verdict will be upheld.[39] Here, Blewitt spoke with an unauthorized person about matters involving Penley's case; therefore, the

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[35] TEX CODE CRIM. PROC.ANN. art. 36.22 (Vernon 1981).

[36] *Chambliss v. State, 647 S.W.2d* 257, 266 (Tex. Crim. App. 1983).

[37] *Alba,* 905 S.W.2d at 586-87 (citing *Green v. State,* 840 S.W.2d 394, 406 (Tex. Crim. App. 1992).

[38] *Romo v. State,* 631 S.W.2d 504, 506 (Tex. Crim. App. [Panel Op.] 1982), *overr. on other grounds, Cockrell v. State,* 933 S.W.2d 73, 89 (Tex. Crim. App. 1996).

[39] *Alba,* 905 S.W.2d at 586-87 (citing *Green,* 840 S.W.2d at 406).

presumption arises that Penley was injured. However, the fact that the first trial ended in a hung jury was not prejudicial to Penley. It shows that some of the jurors in the first trial had a reasonable doubt as to Penley's guilt and some of the jurors believed he was guilty. This knowledge on Blewitt's part is neutral in effect; it does not make it more likely that Blewitt would want to assess a greater punishment at the punishment phase.

Blewitt's affidavit states that on Monday, the jury rendered its verdict and then, *at that time,* some of the jurors mentioned the article and its contents in her presence. Texas Rule of Appellate Procedure 21.3(f) provides that a defendant must be granted a new trial when, after retiring to deliberate, the jury receives other evidence.[40] In such cases, it must be shown that (1) the other evidence-was actually received by the jury, and (2) such evidence was detrimental or adverse to the defendant.[41] The effect of the evidence on the jury is not a consideration; the controlling factor is the

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[40] TEX. R. APP.P.21.3(f).

[41] *Reed v. State,* 841 S.W.2d 55, 59 (Tex. App.-El Paso 1992, pet. refd).

character of the evidence in light of the issues before the jury.[42] The following are some examples of instances where new matters were found to be detrimental to the accused: in *Bearden v. State,*[43] a juror commented on the alcohol service policies of a defendant nightclub; in *Alexander v. State,*[44] a juror stated during deliberations that he knew the accused and that "his character was bad"; in *Hunt v. State,*[45] a juror speculated on details of a murder based on his Marine Corps training; in *Stephenson v. State,*[46] a juror claimed to know facts personally, and other jurors claimed to have personal knowledge that some of the witnesses were not truthful; and in *Shivers v. State,*[47] *a* jury foreman drove to the crime scene daring jury deliberations and reported to the jury that an eyewitness's view was not obstructed by a tree.[48]

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[42] *Id.*

[43] 648 S.W.2d 688, 692 (Tex. Crim. App. 1983).

[44] 610 S.W.2d 750, 752 (Tex. Crim. App. [Panel Op.] 1981).

[45] 603 S.W.2d 865, 868-69 (Tex. Crim. App. [Panel Op.] 1980).

[46] 571 S.W.2d 174, 176 (Tex. Crim. App. [Panel Op.] 1978).

[47] 756 S.W.2d 442, 443-44 (Tex. App.-Houston [1st Dist.] 1988, no pet.).

[48] *Id.* at 445.

The present case is unlike the examples above, and the article here was not detrimental to Penley in light of the issues before the jury. The article did not contain any information the jurors did not already know, other than the fact that a previous trial had ended in a hung jury. Further, the record does not reflect that the jurors discussed the newspaper article among themselves prior to their verdict on punishment. The trial court did not abuse its discretion in denying Penley's motion for new trial. This point of error is overruled.

Last, Penley contends the trial court erred in admitting expert testimony by Officer Knapp that Penley's intoxication caused the collision and, consequently, Flood's death. The State asked Officer Knapp if he believed "as a causative factor that intoxication had anything to do with the collision." Penley objected on two grounds: (1) that the "witness is not qualified to render such an opinion," and (2) that is "exactly what this jury is here to decide." The trial court held a "gatekeeper" hearing outside the presence of the jury. After the hearing, the trial court allowed Officer Knapp

to testify that Penley's intoxication was a causative factor in the accident. During the hearing, Penley's counsel also objected to Officer Knapp's testimony on the basis that it violated Rules 401, 402, and 403 of the Texas Rules of Evidence.[49] On appeal, Penley contends Officer Knapp's testimony does not comply with the dictates of *Kelly v. State,*[50] *Jordan v. State,*[51] or Rule 702 of the Texas Rules of Criminal Evidence.

Rule 702 governs the admission of all expert testimony[52] and provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.[53]

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[49] TEX. R. CRIM. EVID. 401, 402, and 403 (Vernon 1997) (now TEX. R. EVID. 401, 402, and 403).

[50] 824 S.W.2d 568 (Tex. Crim. App. 1992).

[51] 928 S.W.2d 550 (Tex. Crim. App. 1996). In *Jordan,* the Court of Criminal Appeals explicitly adopted the *Daubert* standards in applying Rule of Evidence 702. *Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469(1993).

[52] *Kelly, 824* S.W.2d at 572.

[53] TEX. R. CRIM. EVID. 702 (Vernon 1997) (now TEX. R.

Under Rule 702, the trial court, before admitting expert testimony, must be satisfied that three conditions are met: (1) that the witness qualifies as an expert by reason of his knowledge, skill, experience, training, or education; (2) that the subject matter of the testimony is an appropriate one for expert testimony; and (3) that admitting the expert testimony will actually assist the fact finder in deciding the case.[54] The trial court's decision may not be disturbed on appeal absent an abuse of discretion.[55] A trial court does not abuse its discretion if its decision is within the zone of reasonable disagreement.[56]

Officer Knapp testified as follows:

EVID. 702).

[54] *Alvarado v. State, 912* S.W.2d 199, 215-16 (Tex. Crim. App. 1995) (citing 2 STEVEN GOODE ETAL, TEXAS PRACTICE: GUIDE TO THE TEXAS RULES OF EVIDENCE: CIVIL AND CRIMINAL §702.2 at 13 (2d ed. 1993)).

[55] *Alvarado, 912* S.W.2d at 216 (citing *Joiner v. State, 825* S.W.2d 701,708 (Tex. Crim. App. 1992)).

[56] *Kelly, 824* S.W.2d at 374.

Q. Okay. Now, with regard to the intoxication of the defendant, based on your investigation and your contact with Mr. Penley, do you believe that at the – time of the collision he had lost the normal use of his physical faculties?

A: Yes, I do.

Q. Do you believe that he lost the normal use of his mental faculties?

A: Yes, sir.

Q. By reason of what?

A: His intoxication.

Q. And that would be consistent with the odor of alcohol that you smelled, correct?

A: Yes, sir.

Q. Okay. Do you believe as a causative factor that that intoxication had anything to do with the collision?

MR. MURPHY: Your Honor, we object to that on two grounds. The witness is not qualified to render such an opinion. And, two that's exactly what this jury is here to decide.

. . . .

MR. MURPHY: He can obviously offer an opinion as to whether or not he thought he was intoxicated. But that causative effect is beyond his expertise.

> He's not demonstrated a Daubert-type qualification to render such an opinion.
>
> And I would request a 702 and 705(b) hearing on that issue under Daubert and Kelly (Phonetic).

Officer Knapp had previously testified that he had been a police officer since 1973. He had taken two eighty-hour courses in accident reconstruction, both an intermediate and an advanced class, a forty-hour advanced accident reconstruction class, and seminars on accident reconstruction lasting two or three days. He also testified that he had worked seventy fatal accidents and averaged eight-to-ten nonfatal accidents a month during that eighteen-year period. He testified that he had made about fifty D.W.I. arrests and that he received training at the academy on field sobriety tests and indicators of intoxication. He also testified that he had been involved in many investigations with intoxicated drivers and their contributions to accidents.

During the gatekeeper hearing, Officer Knapp testified that the way Penley drove his car and struck Flood's vehicle was consistent with someone who was intoxicated. Knapp testified that, in his training and experience, alcohol affects a driver's depth perception, reaction time, and

judgment. Officer Knapp testified that the positive HGN test also contributed to his opinion that Penley was intoxicated. During cross-examination, defense counsel asked Officer Knapp what scientific methods and procedures formed the basis of his opinion. Officer Knapp responded, "the scientific that has been proven that a person under intoxication does not perform. They don't pass the test like a sober person would. They don't react the same as a sober person would." Defense counsel then asked, "What scientific proof are you relying upon in rendering this opinion?" Defense counsel continued, '?what scientific evidence are you relying upon that a sober person does better on a test than an intoxicated person?" Officer Knapp could not answer these questions, nor could he answer defense counsel's questions on how the "scientific" principles he was referring to had been validated or subjected to peer review. Penley is arguing that because Officer Knapp could not support his opinion with scientific evidence, the trial court should not have allowed him to testify on the cause of the accident. The question here is whether scientific evidence supporting Officer Knapp's opinion was necessary in the instant case.

In *Kelly v. State*, the Court of Criminal Appeals held

that the proponent of expert testimony or evidence based on a scientific theory must show by clear and convincing evidence that the evidence is (1) reliable, and (2) relevant to assist the jury (or judge) in its fact finding duty.[57] In determining reliability, evidence derived from a scientific theory must satisfy three criteria in any particular case: (a) the underlying scientific theory must be valid; (b) the technique applying the theory must be valid; and (c) the technique must have been properly applied on the occasion in question.[58] Under Rule 104(a) and (c) and Rule 702 of the Texas Rules of Evidence,[59] all three criteria must be proven to the trial court, outside the presence of the jury, before the evidence may be admitted.[60]

The Texas Court of Criminal Appeals has also provided a list of nonexclusive factors that could affect atrial

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[57] *Kelly, 824* S.W.2d at 572.

[58] *Id.* at 573.

[59] TEX. R. CRIM. EVID. 104(a), (c); and 702 (Vernon 1997) (now TEX. R. EVID. 104(a), (c); and 702).

[60] *Id.*

court's determination of reliability.[61] Factors that could affect a trial court's determination of reliability include, but are not limited to, the following: (1) the extent to which the underlying scientific theory and technique are accepted as valid by the relevant scientific community, if such a Community can be ascertained; (2) the qualifications of the expert(s) testifying; (3) the existence of literature supporting or rejecting the underlying scientific theory and technique; (4) the potential rate of error of the technique; (5) the availability of other experts to test and evaluate the technique; (6) the clarity with which the underlying scientific theory and technique can be explained to the court; and (7) the experience and skill of the person(s) who applied the technique on the occasion in question.[62]

In Hartman v. State,[63] the Court of Criminal Appeals made it clear that the *Kelly* test applies to all evidence based on a scientific theory and not just to evidence based on novel

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[61] *Id.*

[62] *Id:*

[63] 946 S.W.2d 60 (Tex. Crim. App. 1997).

scientific theories.[64] In *Nenno v. State*,[65] the court addressed the issue of whether *Kelly* is applicable to nonscientific expert testimony, i.e., expert testimony that involves technical or other scientific knowledge. -The court stated that the general principles announced in *Kelly* apply, but it stated thatthe specific factors outlined in *Kelly* and *Daubert* may or may not apply, depending on the context.[66] The court

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[64] *Id.* at 63.

[65] 970 S.W.2d 549 (Tex. Crim. App. 1998).

[66] *Moore v. Ashland Chemical, Inc., 126 F.3d* 679, 685-89 (5th Cir. 1997), rehearing en bane granted (general principles of Rule 702 recognized in *Daubert* apply to other species of expert testimony except where self-evident that the Court's remarks apply only to scientific knowledge; reliability of testimony should be evaluated by reference to the standards applicable to the particular field in question; four *Daubert* "factors" apply to hard science but not to clinical medicine); *United States v. Jones,* 107 F.3d 1147, 1156 & 1158 (6th Cir. 1997) ("gatekeeper" and reliability language applicable; but four factors discussed regarding scientific validity should not be extended beyond the scientific realm); *Tyus v. Urban Search Management,* 102 F.3d 256, 263 (7th Cir. 1996)*(Daubert* framework applies to social sciences, but "the measure of intellectual rigor will vary by the field of expertise and the way of demonstrating expertise will also vary"); *see also Freeman v. Case Corp.,* 118 F.3d 1011, 1016 n.6 (4th Cir. 1997), *cert. denied,* ___ U.S. ___ 118 S.Ct. 739, 139 L.Ed.2d 676 (1998) (where an expert relies on his experience and training and not a particular methodology to reach his conclusions *Daubert* analysis is inappropriate); *United States v. Bighead,* 128 F.3d 1329, 1330(9th Cir. 1997) *(Daubert's* tests for admissibility do not require exclusion of expert testimony that involves specialized knowledge rather than scientific theory); *Compton v. Subaru of*

explained:

> When addressing fields of study aside from the hard sciences, such as the social -sciences or fields that are based primarily upon experience and training as opposed to the scientific method, *Kelly 's* requirement of reliability applies but with less rigor than t& the hard sciences. To speak of the validity of a "theory" or "technique" in these fields may be roughly accurate but somewhat misleading. The appropriate questions are: (1) whether the field of expertise is a legitimate one, (2) whether the subject matter of the expert's testimony is within the scope of that field, and (3) whether the expert's testimony properly relies upon and/or utilizes the principles involved in the field. These questions are merely an appropriately tailored translation of the *Kelly test to* areas outside of hard science. And, hard science methods of validation, such as assessing the potential rate of error or subjecting a theory to peer review, may often be inappropriate for testing the reliability of fields of expertise outside the hard sciences.[67]

Following the court's decision in *Nenno,* we find that Officer Knapp was qualified by his training and experience to testify as an expert in accident reconstruction and as an expert as to whether Penley's intoxication contributed to the accident

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Am., 82 F.3d 1513,1518 (10th Cir. 1996) (four factors applicable only when a proffered expert relies on some principle or methodology rather than on experience or training).

[67] *Nenno,* 970 S.W.2d at 561.

because of his experience with intoxicated drivers and how their intoxication affects their ability to drive. Officer Knapp's field of expertise was a legitimate one, his testimony was within the scope of his training and experience, and his testimony utilized his experience and training in accident reconstruction and contact with intoxicated drivers. This point of error is overruled.

The judgment is affirmed. /s/
Ben Z. Grant
Justice

Date-Submitted: July27, 1999
Date Decided: August 23, 1999
Publish

Court of Appeals
Sixth Appellate District of Texas.

JUDGMENT

Paul Christopher Penley, Appellant	Appeal from the 380th Judicial District Court of Collin County, Texas (Tr. Ct. No. 380-81132-97). Opinion delivered by Justice Grant, Chief Justice Cornelius and Justice Ross participating.
No. 06-98-00082-CR V.	
The State of Texas, Appellee	

BE IT REMEMBERED, that in accordance with the Court's Opinion of this date, the Court finds that there was no error in the judgment below. Therefore, it is **ORDERED** that the judgment of the court below is in all things **AFFIRMED.**

It is further **ORDERED** that the appellant Paul Christopher Penley shall pay all costs expended in this appeal.

RENDERED AUGUST 23, 1999
BY ORDER OF THE COURT
WILLIAM J. CORNELIUS
CHIEF JUSTICE

ATTEST:
Tibby Hopkins, Clerk

APPENDIX B
(Postcard)

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITAL STATION, AUSTIN, TEXAS

January 12, 2000
COA#: 06-98-00082-CR
RE: Case N0. 1750-99
STYLE: PENLEY, CHRISTOPHER PAUL [Sic]

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

(JUDGE HOLLAND NOT PARTICIPATING)

JAMES M. MURPHY
P O BOX 140809
DALLAS, TX 75214

APPENDIX C

BY MR. MURPHY:

Q Ms. Wilson, what is your present occupation?

A I'm a property evidence specialist with Plano Police Department.

Q How long have you been in that capacity?

A Approximately six years.

Q Were you in that capacity on October 2nd, 1995, when Officers Matt Dawson and Larry Frazier brought a blood evidence to the property room?

A Yes, sir, I was.

Q What was the practice of the Plano Police Department property evidence section with respect to storing blood samples in connection with intoxication offenses?

A Once the blood was secured in a locker, I would retrieve it in the morning, the next morning that I came to work. I would assign it a tag and a bin number, and it was then stored in a basket in the office of the property room until it went to the lab.

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Q At room temperature?

A Yes, sir.

Q When you say it was dropped in a locker, what do you mean?

A The officers have access to stored lockers and mailboxes where it's secured until we can retrieve it.

Q Was that what happened in this case?

A Yes, sir.

Q It was placed in a locker?

A It would have been a locker or a mailbox, yes, sir.

Q It wasn't delivered to you?

A No, sir.

Q So it wasn't the practice of the Plano Police Department when you receive blood evidence to refrigerate it, correct?

A No, sir.

Q Was the -- was the practice of tagging blood evidence and giving receipts for it in place at that time? In other words, how did you control the intake of blood?

A Once we received it, we assigned it a tag and then it stayed in the basket for the lab until it went to the lab.

Q And what was the procedure for getting things to the lab?

A Ms. Collins or myself would transport it in person to the DPS lab in Garland.

Q Well, would you-all wait until you had enough or had more than one sample?

A Yes, sir, at that time that's how we did it.

Q And did that procedure -- did the procedures of handling blood evidence in connection with intoxication offenses, and

other offenses for that matter, change after the first trial of this case?

A Yes, sir.

Q Was that as a result of this trial?

A I believe so, yes, sir.

Q What measures were taken to change that?

A The property manager made some changes so that now we go to the lab every week regardless of how much evidence is going. And the blood tubes are also stored in a refrigerator in the property room until they go to the lab.

Q Was that changed by some SOP directive?

A I believe so, yes, sir.

Q Do you have a copy of that?[1]

A No, sir, I don't.

Q Well, was -- was there something about the change in procedure that you're aware of that Plano felt that there was something wrong with the former procedure? You follow what I'm saying?

A Yes, sir, I do.

Q In other words, were these measures taken which, if

[1] These changes in policies and procedures appear as Defendant's Exhibits 7-13, attached to the Reporter's Record of the hearing on Petitioner's Motion for New Trial, IX R.R.).

they were taken previously, would they have met -- made the event less likely to occur?

A I believe that the ID manager made these changes so that there would be no question as to the security of it or...

Q Just kind of a safety measure?

A Yes, sir.

Q It wasn't something that you felt that would improve the reliability of the evidence? Is that what you're saying?

A No, sir. From what I understand, no, sir.

Q So would you agree with me that these measures were taken as a precautionary measure?

A Yes, sir.

Q As opposed to a remedial measure? You follow what I'm saying?

A No, not exactly.

Q Well, remedial means there's something wrong.

A Okay.

Q Precautionary means --

MR. WADDILL: Excuse me. I disagree. That's a misstatement of the law. Remedial does not mean something is wrong.

MR. MURPHY: Well, that's what the rule says.

MR. WADDILL: It does not.

THE COURT: Well, I think remedial -- where

does it say something is wrong?

MR. MURPHY: Well, it says when, after an event, measures are taken which, if taken previously, would have made the event less likely to occur. To me that means something is wrong somewhere.

THE COURT: Well, remedial is remedial. I think everybody understands what it means. Let's go ahead.

MR. MURPHY: Well, apparently Mr. Waddill and I don't --

THE COURT: Well, okay. Let's go ahead.

Q (By Mr. Murphy) In other words, was what was done later as a result of the first trial in this case a precautionary measure as opposed to remedial?

A Yes, sir.

Q Do you understand what remedial means?

A I understand that you're asking me, did we do that as a, you know, because of a precautionary measure or because something was wrong from the first one. I understand that we did this as a precautionary measure so there would be no question about the blood.

MR. MURPHY: That would be my offer of proof on cross-examination of this witness under Rule 407 the exception to exclusion.

* * * * *

After the Petitioner's offer of proof, the Court sustained the State's objection and prohibited Petitioner, through his counsel, from adducing such facts from Ms. Wilson on cross-examination:

THE COURT: Well, my understanding of the rule ~~is that I'm~~ going to sustain the State's objection. And you are going to object to my sustaining the objection.

MR. MURPHY: I'm going to object to excluding this evidence on the grounds that it deprives this defendant of the effective assistance of counsel. It deprives him of the right to confront and cross-examine the State's witnesses. And it violates Rule 407 and other rules in dealing with the confrontation clause of the United States and Texas Constitution in dealing with examining the reliability of relevance of evidence admitted against him in the trial.

THE COURT: All right. Could I ask to see both sides up here again.

THE COURT REPORTER: Is this off the record?

THE COURT: Yes.

(A bench conference was held.)

THE COURT: My ruling is the same. I hope you do put your expert on.[2] If you don't, you may -- let's start

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the trial. I'm going to take a quick break.

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[2] Petitioner submits this is the reference to Petitioner's expert at the first trial, Dr. William T. Lowry.